7 ETHICS NIGHTMARES

YOU DIDN'T KNOW YOU HAD

Technology has revolutionised the way we practise law, but what does that mean for our ethical obligations? **TAHLIA GORDON** walks us through the mine field.

The ability to detect and identify ethical issues and respond in an appropriate manner is one of the most important attributes of "good lawyering". This attribute is, however, becoming increasingly difficult as the dynamics of legal practice fundamentally change. Globalisation and technological innovation have had a profound effect on the practice of law. The impact of computers has seen the professional lives of lawyers (and their clients) irreversibly altered as technology provides unprecedented levels of accessibility to information and communication on the global stage. Irrespective of firm size or practice type, technology is driving legal practice in a new and exciting direction – but an array of new ethical dilemmas has arisen.

1. The BYOD data breach

Mobile availability 24/7 is essential for today's legal practice and the demand for bring your own device (BYOD) has invariably grown. Smartphones, iPads, net books and laptops that enable mobility – and thumb drives that store client files – are being widely adopted by the legal profession.

Unfortunately, this convenience can lead to an ethical nightmare if used inappropriately.

The use of mobile devices outside the confines of a firm's network can pose a significant threat to client confidential information being hacked if the devices are not password protected and encrypted, and if the devices are being used in an unsecured wireless network (such as a coffee shop, airport or even a courthouse).

While a number of law firms issue secure mobile devices to their staff, many do not. Lawyers and their staff who use firm-owned mobile devices to check and send emails or work on documents in an unsecured environment are at risk of being hacked. Moreover, lawyers who use their own personal devices for work are equally at risk of being hacked.

These ethical nightmares can, however, be managed. While we cannot prevent lost or stolen equipment, or perhaps even an intrusion by a third-party hacker, procedures exist for addressing and mitigating these risks. Establishing and enforcing a written firm policy dictating technology use; prohibiting or limiting work via unsecured wireless networks; encrypting all portable devices and requiring password protection for all mobile devices are just a few examples of how lawyers and firms can mitigate or obviate a BYOD data breach.

2. Social media minefields

According to the American Bar Association and other regulators of the legal profession around the world, the use of social media by lawyers and law firms has grown exponentially over the past few years. This should come as no surprise. Social media sites such as Facebook, LinkedIn, Twitter, MySpace, YouTube, Legal OnRamp, Avvo and Foursquare enable lawyers and firms to network and market their skills, as well as investigate and conduct research cost-effectively with minimal effort. Although integral to legal practice, social media can be an ethical minefield for lawyers unaware of its potential consequences.

There is a multitude of ways in which a lawyer or firm can violate the rules of professional conduct when using social media. These include the risk of disclosing (inadvertently or otherwise) privileged or confidential information about current, former or potential clients; possible breaches of the advertising rules and regulations when discussing credentials and experience; a risk of inadvertently forming a lawyer-client relationship; and a risk of committing fraud or dishonesty offences by "friending" witnesses, parties and/or jurors when the only reason to do so is to obtain information. The implications of these violations for the lawyer, the law firm and the client are immense.

These potential nightmares can be mitigated by the implementation of a robust management framework that sets out who, what, where, when (and when not) to engage in social media use. Regulators such as the NSW Office of the Legal Services Commissioner (OLSC) have published social media guidelines offering insights into the types of questions that should be asked when social media is being used. The guidelines are intended to be read in conjunction with the relevant practice rules and legislation and should be considered by all lawyers using social media.

3. Ghost blogging

Everyone seems to have a blog these days, and lawyers are no exception. Recognised for their ability to attract clients, promote expertise or specialisation, and build a solid network, blogging has been lauded as an essential tool. A good blog, however, generally requires time and energy, which most lawyers don't have. A simple solution to this predicament is ghost blogging – having someone else write your blog for you.

Ghost writers in law are not new. Junior lawyers and paralegals have always researched and written briefs and articles for partners in the partner's name. Blogging, however, is fundamentally different. It is a personal statement of opinion, experience and knowledge. It is essentially a form of advertising. A ghost blog written by others and presented as the lawyer's voice is deceptive and may therefore be in breach of the advertising rules. It may also damage the lawyer-client relationship by undermining the natural trust that a good blog can establish between a lawyer and their readers.

Savvy lawyers might think that adding a disclosure of the ghost-blogging to the fine print in the blog's terms of use may solve this problem. The effect of a disclaimer is, however, questionable and it concedes the obvious: the blog is just a marketing tool. Lawyers should think carefully about the ethics of using a ghost blogger and why they want to have a blog at all.

4. Endorsements and testimonials

The use of online reviews on firm-owned and other websites has gained immense popularity within the legal profession over the last few years. Social networking sites such as LinkedIn, lawyer listing sites such as Martindale or Avvo, and sites such as Google+ Places and Yelp regularly feature endorsements and testimonials about individual lawyers. Again, this comes as no surprise. Online reviews can be a powerful tool in convincing a potential new client to reach out and make contact. Endorsements and testimonials are, however, a double-edged sword.

On one hand, endorsements from previous clients or colleagues can positively impact reputation and generate business. On the other hand, endorsements are a potential ethical nightmare if the content is untrue.

An endorsement from someone familiar with a lawyer's skill and experience might present very few problems. But what if the endorsement comes from someone who does not know the lawyer very well – or at all? Ever been endorsed by someone you don't know for a skill you don't have? If you are aware that such an endorsement or testimonial exists online, you may be in breach of the Solicitors' Rules. According to Rule 36, lawyers must ensure that any advertising, marketing or promotion concerning them or their firm is not false, misleading or deceptive or likely to mislead or deceive or be offensive, or prohibited by law. The ease with which people can post testimonials and endorsements online renders this scenario more than a real possibility. This potential ethical nightmare can, however, be mitigated if lawyers understand the parameters of online testimonials and endorsements, and manage posts (where they are aware of them) to ensure they do not breach the Conduct Rules.

5. The Dropbox dilemma

Dropbox is one of the most popular "public" Cloud-based storage services for lawyers today. A cost-effective way to share, edit, and access documents from any device with clients or members of a firm, Dropbox is an obvious choice. Entrusting data to a generic Cloud provider like Dropbox or Google Drive can, however, be an ethical minefield if used without due care.

Confidentiality and control over data are two of the most important ethical risks of using a generic "public" Cloud. When data is stored in-house at law firms, a reasonable degree of control can be maintained. When you entrust data to other service providers via the Cloud, that degree of control rests with them (and sometimes not even them). This raises many important questions, such as "Who will have access to my client information?" and "What happens if my client data becomes lost or corrupted?"

In order to minimise risk, information should be obtained from the service provider about the service provider's terms and conditions, with a particular focus on whether the data is encrypted; who retains ownership over the data; whether notices are provided if a third-party (such as the government) asks for access to the information; whether the data is accessible if the provider were to go bankrupt; and whether the data is stored in Australia or abroad. The Cloud Computing Guideline, published by the OLSC, provides a comprehensive list of questions that should be asked.

The answers to these questions are often as varied as the service provider's agreement, particularly with generic Cloud providers, and can often be difficult to obtain. Lawyers using Cloud-based service providers like Dropbox should probably consider law practice-specific Cloud storage systems as an alternative.

6. Free legal advice online

Over the past few years, several new websites have been launched offering the general public a way to obtain answers to questions concerning the law. In Australia, justanswer.com, for example, allows the public to ask a question of "an expert" and get a "professional answer" in less than eight minutes. According to these websites, only "general informational advice" is provided and no lawyer-client relationships are formed. While these online sites may be beneficial for the public seeking assistance with the law, they can pose an ethical nightmare for the lawyers involved. Three ethical pitfalls immediately come to mind. Firstly, the labelling of a lawyer as an "expert" may be a breach of Rule 36 of the Solicitors' Rules. A lawyer who provides family law advice on justanswer.com may be a very good family lawyer but it is arguable whether she/he is an "expert" in family law. Secondly, question-and-answer websites invite users to submit specific, detailed questions. Lawyers who respond could be perceived by the user as engaging in a lawyer-client relationship. In the online world, virtually everyone is a potential client. Thirdly, the user may also perceive an answer from the lawyer as constituting "legal advice". While the latter may be covered by a "click-through" disclaimer, the veracity of such a disclaimer is relatively small. The line between legal information and legal advice can be difficult to draw, particularly when answers to legal questions are presented in written form. Providing legal information involves discussion of legal principles, trends, and considerations – the kind of information one might give in a speech or newspaper article, for example. Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person's circumstances. A look at numerous past answers posted by lawyers on justanswer.com is far more consistent with the provision of legal advice than legal information.

7. Wearable technology

The release of the Apple Watch this year caused quite a commotion amongst technophiles and technophobes alike, and it is not difficult to see why. Wearable technology provides quick access to information on a small device without having to fumble for a phone. While a relatively new phenomenon, wearable devices such as smartphones, Google Glass and Fitbit are already revolutionising the way we store, retrieve and develop information – and it appears the legal profession has embraced this new trend. Last year in Canada, the court permitted a personal injury lawyer to use data from a Fitbit wristband in a personal injury claim to support his client's case.

Wearables are probably a perfect fit for lawyers, as they allow even greater flexibility than BYOD to practise law remotely. Smartwatches, for example, have a better battery life than almost all smartphones, and can therefore be a more reliable means of keeping in contact with clients – especially in court or behind the wheel, where the use of smartphones are not allowed. Yet, like all of the innovations discussed above, wearable technology for lawyers may be a curse in disguise.

Several ethical nightmares come to mind. Firstly, wearable devices, much like BYOD, are a cyber-security risk. If the wearable device is stolen or misplaced, lawyers face the very real risk of losing client information. Secondly, the data generated from wearables may be stored locally, but most of the data is likely stored in the Cloud. Thirdly, wearables, by their very nature, can easily be taken off, worn by others, or jostled to create false readings. Thus, wearable data might be easy to undermine.

Conclusion

The pace at which technology is being developed, and the uptake of such technology by many lawyers and firms, means lawyers can no longer be luddites and continue resisting the digital age. Technology is integral to legal practice today and lawyers must be aware of what technology exists and how it can be used ethically. When using such technology, lawyers should bear in mind that ethics are based on values, not rules. **LSJ**

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TAHLIA GORDON

TAHLIA GORDON is the Co-Director and Founder of Creative Consequences Pty Ltd, a boutique consultancy that advises organisations, regulators and governments in regulation, complaint investigations, governance and ethics.